Before the
FEDERAL COMMUNICATONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Verizon Petition for Emergency	)	WC Docket No. 02-202
Declaratory and Other Relief	)	
	)	

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTA),[1] through the undersigned and pursuant to the *Public Notice* released by the Federal Communications Commission's (FCC) Wireline Competition Bureau (WCB),[2] hereby submits its comments on the Petition for Emergency Declaratory and Other Relief of Verizon (Petition). USTA fully supports the Petition and the relief requested therein. Accordingly, USTA asks that the FCC, with utmost speed, grant the Petition and "provide clear guidelines to the industry that allow carriers to protect themselves from the industrywide financial turmoil"[3] that has produced a spate of carrier bankruptcies and pushed other carriers to the brink of insolvency.

[1] USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video service over wireline and wireless networks.
[2] *Public Notice*, WC Docket No. 02-202, DA 02-1859 (rel. July 31, 2002) soliciting comment on Verizon's Petition for Emergency Declaratory and Other Relief.
[3] Petition at 2.

DISCUSSION

The telecommunications industry has never witnessed the degree of carnage that has occurred over the past two years. More than a dozen carriers have filed for bankruptcy including carriers such as: Global Crossing, McLeodUSA, Teligent, Winstar, Northpoint and WorldCom. It is speculated that more bankruptcies may soon occur.[4] Great speculation surrounds the fate of Qwest, a former Regional Bell Operating Company (RBOC), with respect to its ability to avoid bankruptcy. Certainly, USTA hopes that the dire prediction of more industry bankruptcies does not come true. Nonetheless, it would be ill-advised for customers, regulators and suppliers of the many distressed carriers to not prepare for the possibility that additional bankruptcies will be forthcoming.

There have been many reactions to this industry crisis. It is understandable that many stakeholders, from the Congress, to consumers, to competitors, would express their concern about the situation and ask that something be done to rectify it. There is no one solution to the economic problems that currently confront the telecommunications industry. Still, all eyes are on the FCC to see what it will do, as the preeminent regulatory agency with responsibility for overseeing the communications industry, to mitigate immediate harms and implement policies calculated to encourage new interest and investment in the communications sector of the national economy. It is a daunting task but one that must be undertaken.

There are both short-term and long-term consequences that flow from FCC action or inaction, and a number of interests will be impacted by its decisions. It is no exaggeration to say

[4] See ***Precursor*** *Group*, Independent Research, Scott Cleland, May 20, 2002, *The "Insolvency Zone": the Bankrupting of the U.S. Telecom Sector*. At the time this piece was written, the author identified 24 carriers and suppliers in the "Insolvency Zone," including WorldCom, which subsequently petitioned the U.S. Bankruptcy Court for the Southern District of New York for protection under Chapter 11 of the U.S. Bankruptcy Code on July 21,

that national security and the economy will be affected by the FCC's response to the crisis. Consumers, investors and currently solvent suppliers and carriers will be directly affected by the FCC's response to industry bankruptcies. It is essential that as the FCC responds to this crisis that it give full and fair consideration to all potentially affected interests. It would be a terrible miscalculation for the FCC to solely focus its efforts on salvaging WorldCom, while it allows currently healthy companies to endure needless financial hardship resulting from the WorldCom bankruptcy.

There will be both short-term and long-term impacts to consider. Still, the ultimate objective must be the survival and health of the entire industry over the long-term. Success in achieving this objective, in part, requires the FCC to accept the proposition that currently healthy carriers are essential contributors to an economic turnaround in the communications industry. FCC telecommunications policy has to be guided by the reality that regulated carriers must be able to operate in a commercially reasonable fashion if they are to remain solvent and capable of meeting customer needs. Carriers that have engaged in responsible business practices and fulfilled their fiduciary responsibilities should not be constrained by regulators as they attempt to effectuate commercially reasonable arrangements in their ongoing relationships with bankrupt or distressed carriers. As pointed out by Verizon, "it is incumbent on the Commission to permit carriers to take the same types of flexible and expeditious measures that firms in other industries may take when faced with similar economic turmoil and uncertainty."[5] "Doing so will be a key part of restoring customer and investor confidence, stabilizing and regularizing the transactional currents, and bringing certainty to what Chairman Powell has described as an 'utter crisis.'"[6]

2002. "Precursor continues to **advise investors to <u>avoid all but the strongest telecom players</u> because as many as 24 of 29 major publicly-traded companies may be at risk of bankruptcy in the quarters ahead.**"

[5] Petition at 2.

[6] *Id*.

Immediately preceding WorldCom's bankruptcy filing, USTA, through its President and CEO Walter B. McCormick, Jr., expressed its concerns about the impact of the WorldCom bankruptcy on other carriers, as well as the customers of other carriers.[7] The McCormick letter is fully in accord with the four principles presented in the Petition. Accordingly, USTA supports the Verizon Petition and the relief requested in it.

Tariff Revisions

A number of large and mid-size carriers and NECA have recently filed tariff amendments intended to clarify, amplify or add more detail concerning actions to be taken should a customer demonstrates itself to be financial distressed and/or at increased risk for nonpayment of its bills. There is nothing extraordinary about such actions. It is what fiscally responsible companies are required to do. Recent experience has demonstrated that telecommunications carriers must act prudently and take commercially responsible steps to safeguard themselves from the risk of customers' refusal or inability to pay for services received. Carriers should be afforded the flexibility to modify their existing tariffs to better meet the increased risk of nonpayment that has been brought about by the economic environment in the telecommunications industry. Supplier-carriers should not be forced into holding the bag for those customers that, as a result of their own failings or circumstances beyond their control, cannot pay their bills. Supplier-carriers such as incumbent local exchange carriers (ILECs) simply cannot afford to absorb hundreds of millions of dollars of costs each month without disastrous impacts to their financial health and their ability to serve their customers. Tariff revisions such as those requested by Verizon, and other similarly intended tariff revisions offered by other ILECs, are a commercially reasonable, but tempered, response to an extraordinary industry condition. It should be noted that what

[7] Letter to the Honorable Michael K. Powell, Chairman, Federal Communications Commission, July 21, 2002, from Walter B. McCormick, Jr., President and CEO, United States Telecom Association (McCormick Letter) (Attached

Verizon proposes with respect to tariff revisions is not new or a matter of first impression. Tariff provisions intended to safeguard ILECs from nonpaying customers have existed and have been modified before.[8] What is being requested is a reasonable and timely opportunity to, in most cases, amend existing tariffs to provide more specificity and make adjustments that better address the circumstances that ILECs confront today. "In the past, the Commission has been receptive to such tariff changes, and it should be so here."[9]

Time is of the essence. Delay by the FCC in acting on pending tariff revisions only serves to increase the financial risk for ILECs that are required to interconnect with other carriers for the exchange of traffic. Unlike suppliers that have the option to provide or not provide goods and services to their customers, ILECs are prohibited from discriminating and must provide service upon request or risk sanctions. Therefore, the FCC has a special responsibility to not place ILECs in the untenable position of having to provide service to non-creditworthy customers without allowing ILECs to impose commercially reasonable conditions upon such customers in order to safeguard ILECs against nonpayment.

Support ILEC Efforts to Secure Adequate Assurance of Payments

Verizon asserts that the FCC should "unequivocally support, *in any bankruptcy court proceedings in which it participates*, the right of carriers such as Verizon to receive payment in advance (or other measures such as security deposits) in order to obtain assurance of payment for the services that they continue to provide." USTA agrees. The FCC should take no action before a bankruptcy court that serves to undermine the ability of carrier-suppliers to obtain the adequate assurances provided for under the U.S. Bankruptcy Code. Rather, in furtherance of the goal of stemming the spread of insolvency throughout the telecommunications industry, the FCC

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hereto). USTA requests that the McCormick Letter be included in the record of this proceeding.

[8] *See* Petition at 4-5.

should affirmatively support carrier-suppliers' rights to secure adequate assurance of payment for services provided to a carrier-debtor during a pending bankruptcy, as well as a "cure" of pre-petition indebtedness where such is provided for under the Code. By supporting supplier-carriers in their efforts to secure their rights to adequate assurances and cures under the Code, the FCC will minimize harmful consumer impacts by supporting the efforts of solvent carriers to remain viable and fully capable of providing service to their customers.

Cure by Purchasers of Bankrupt Carriers' Existing Service Arrangements

Verizon asserts that "[s]ome carriers that purchase carrier assets, including customer accounts, in a bankruptcy have sought to circumvent the basic principles of bankruptcy law by claiming that the Communications Act permits them to receive the benefit of and assume the bankrupt carrier's existing service arrangements without curing the debt on those arrangements."[10] Verizon believes that there is no support in the Communications Act for this practice, and that if permitted, it will "cause grave harm to carriers that provide service to bankrupts, because it will deprive those carriers of the rights enjoyed by other suppliers that provide service under executory contracts."[11] USTA agrees with Verizon that to the extent a successor in interest to a bankrupt carrier's assets attempts to circumvent its cure obligations under the Bankruptcy Code by asserting a superior right under the Communications Act to existing service arrangements without curing the debt on the arrangements, the FCC should not countenance such an attempted subversion of the Bankruptcy Code.

Acceding to such subversive efforts does not further the public interest. It is a virtual certainty the acquiring carrier will only pursue the bankrupt's assets in the bankruptcy proceeding if they can be acquired at a discount, even considering the debt owed on the assets by

[9] *Id*. at 4.
[10] *Id*. at 8.

the bankrupt carrier. While there may be a benefit in having another carrier step in to provide service to the bankrupt carrier's customers, any net benefit is lost if the customers of the creditor-carrier are left paying for the acquisition because there has been no cure of the debt, and the creditor-carrier is left with diminished resources with which to serve its customers. The acquiring carrier is the winner and the creditor-carrier's customers, employees and shareholders are the losers. The inequity produced cannot be justified by the argument that it is necessary in order to provide an incentive for another carrier to acquire the assets of the bankrupt carrier. As pointed out by Verizon, "[r]equiring buyers to cure if they wish to assume existing contracts will not discourage the purchase of CLEC assets."[12]

Bankruptcy law and communications law can and must be harmonized. Section 365 of the Bankruptcy Code is not in conflict with the Communications Act and does not undermine the public policy objectives of the Congress that are embodied in the Communications Act. An appropriate harmonization of Section 365 and the Communications Act allows for an orderly assumption of contacts and arrangements by an acquiring carrier and a cure of the debt owed to the creditor-carrier in association with those contracts and arrangements. Such a harmonization produces a win-win for all customers.

CLECs Should Provide Information for Orderly Customer Transfers

Verizon asserts that a "problem that has often arisen in the context of carriers transferring existing service arrangements is the failure of those carriers to coordinate their connect and disconnect orders with serving carriers such as Verizon, thereby requiring serving carriers to create additional circuit capacity where none is needed."[13] Verizon proposes that the FCC "modify its discontinuance guidelines to mandate that a single CLEC assume the responsibility

[11] *Id*.
[12] *Id*. at 10.

of coordinating end-user transfers with the ILEC in each and every mass migration. The logical default rule would be that the acquiring carrier become the responsible CLEC."[14] USTA supports this proposal. Further, as stated in the McCormick letter,[15] USTA believes that when a carrier files under Chapter 11 and initiates an auction of assets, it should have to inform customers of a possible discontinuation of service. Similarly, upon filing a motion for sale or acceptance of a purchase agreement, a carrier should be required to inform its customers that it will cease or transfer operations when the sale is complete. The same should be true when a bankruptcy is converted from a Chapter 11 reorganization to a Chapter 7 liquidation.

USTA Principles

USTA and its members have given considerable thought to the challenges presented to the communications industry by the economic downturn in this segment of the economy. USTA has adopted the following six principles which it believes to be consistent with the relief requested by Verizon in its Petition.

A. The FCC and state regulators should allow supplier-carriers to take reasonable measures in advance of any given interconnecting carrier's bankruptcy to assure that the supplier-carriers will receive payments for their services, either in the form of permitting tariff changes, allowing supplier-carriers to require advance deposits from financially doubtful interconnecting carriers, or allowing advance billing and/or prepayment for anticipated services.
B. After any given interconnecting carrier's bankruptcy petition, the FCC should defer to the bankruptcy law and rules, which require payment (or adequate assurances of payment) for post-petition services so as to preserve the abilities of the numerous supplier-carriers to continue to provide services.
C. In addition, in the event that supplier-carriers are unable to recover all debt owed them for services (either pre-petition or post-petition) in a bankruptcy proceeding of an interconnecting carrier, it is reasonable to allow the supplier-carriers to recover this cost through some clear pricing or costing mechanism provided by the FCC.
D. Any such mechanism should also allow the recovery of UNE charges defaulted on by a bankrupt interconnecting carrier.

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[13] *Id*.
[14] *Id*. at 11.
[15] McCormick Letter at 3.

E. The FCC should support the application, to supplier-carriers as holders of "executory contracts" with interconnecting carriers, of the Bankruptcy Code's "cure" provisions whereby pre-petition services remaining unpaid at the time of a bankruptcy filing must first be paid ("cured") by a defaulting interconnecting carrier before that carrier can continue to benefit, post-petition, from its preexisting relationships with supplier-carriers.

F. Finally, the FCC should provide streamlined mechanisms for the orderly transfer of customers and facilities from a liquidating interconnecting carrier to such a carrier that will assume the liquidating carrier's service obligations, facilities and the obligation to "cure" pre-petition defaults of the bankrupt carrier.

USTA believes that the above-stated proposals best safeguard the continued ability of supplier-carriers to service their local communities in the fashion demanded by federal and state laws. USTA asks the FCC to expeditiously act on the Verizon Petition and endorse the principles presented therein.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By:_____

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VIA ELECTRONIC DELIVERY

July 21, 2002

Honorable Michael K. Powell
Chairman
Federal Communications
Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Powell:

It is widely anticipated that WorldCom will file for bankruptcy in the near future.[16] The United States Telecom Association (USTA), on behalf of its members, wishes to express its concern about the significant financial injury to the telecommunications industry, the customers it serves, and the nation's economy if the Federal Communications Commission (FCC) fails to take appropriate actions to ensure that this and other bankruptcies do not lead to a state of crisis in the telecommunications industry.

In this respect, any actions by the FCC should be designed to serve two equally important goals. First, any customer disruptions as a result of this or other bankruptcy filings should be kept to a minimum. Second, and equally important, the FCC should take affirmative steps to ensure that WorldCom's impending bankruptcy does not undermine the financial stability of other carriers that provide services to it, and that such supplying carriers have adequate assurances that they will be paid for those services. By the same token, it is critical that the FCC not take any actions at the expense of, and causing increased exposure for, other telecommunications service providers.

As you well know, the nation's telecommunications infrastructure is extraordinarily interconnected and interdependent. Thus, WorldCom's bankruptcy would likely affect, either directly or indirectly, every domestic telecommunications service provider in the

[16] *See* The Wall Street Journal, Friday, July 19, 2002, *WorldCom to File Chapter 11, as Cash Reserves Dwindle Fast*, p.1.

United States, and their customers. As the FCC responds to a WorldCom bankruptcy, it must be mindful of how its actions will impact not only WorldCom and its customers, but other carriers and their customers as well

ILECs intend to fulfill their obligations to continue providing services under the bankruptcy laws. They should not, however, collectively be forced to absorb hundreds of millions of dollars of costs each month for interstate access, intrastate access, and the provision of UNEs, in order for WorldCom to continue to provide service, without adequate assurance of payment. In addition, the FCC will need to find a mechanism to address the impact of WorldCom's potential unpaid contribution to Universal Service. And if the FCC should intervene in a WorldCom bankruptcy proceeding, it must do so with an explicit acknowledgment of the fact that the FCC's telecommunications policy priorities do not, and should not, preempt the rights of creditors and service providers under the Bankruptcy Code.

In order to address such concerns, USTA asks the FCC to implement, as quickly as possible, the following five steps, which if adopted will ensure that the interests of all telecommunications carriers and their customers are fairly balanced.

1. Preservation of Rights in Advance of a Bankruptcy Filing

The FCC should allow supplier carriers to take reasonable measures to assure that they will receive payment for the services they provide, and to protect themselves before problems occur, by approving tariff changes to protect those companies that provide interstate services to connecting carriers. USTA also recommends that supplier carriers be permitted to secure adequate deposits from those connecting carriers for which there is a demonstrable financial concern (e.g. bad payment history, lower debt rating, etc.). Finally, USTA recommends that supplier carriers be able to bill all carrier services (including usage) in advance when financial circumstances warrant. No FCC policy or rule should implicitly or explicitly deter supplier carriers from taking such prudent steps to protect their interests.

2. Preservation of Rights in Bankruptcy

The best way to ensure that all consumers who are connected to our nation's telecommunications system continue to receive services is to ensure that supplier carriers that maintain service to bankrupt carriers get paid. Bankruptcy courts generally recognize that suppliers and utilities that continue to provide service during the pendency of the bankruptcy are entitled to advance payment or other assurance of compensation. While the FCC rightly supports the maintenance of service to customers of bankrupt carriers, in the long run this public interest goal will be served best if the FCC advocates equally strongly for payment to carriers that provide service to a carrier-debtor in bankruptcy.

3. Recovery of Interstate Uncollectibles in Bankruptcy

If supplying carriers are unable to recover extraordinary debt owed to them by WorldCom or another interconnecting carrier, it is reasonable to allow them to pass on at

least a portion of such large new costs to their customers. Thus, the FCC should provide a clear mechanism for the recovery of non-collectible charges as a result of the bankruptcy. For example, the FCC could allow recovery through the exogenous cost mechanism in its price cap rules or through a limited waiver of those rules. In the case of rate of return carriers, the FCC should allow an adjustment in rates to account for this factor. The FCC also should encourage state regulators to take similar actions with respect to intrastate services.

4. Recovery of UNE Uncollectibles in Bankruptcy

Likewise, the FCC should make clear that its pricing rules require that carriers providing unbundled elements be allowed to include a compensatory factor to recover non-collectible UNE charges.

5. Cure Requirements

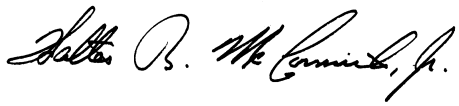
It is settled law that the FCC should reconcile its policies under the Communications Act with federal bankruptcy law. Thus, the FCC should make clear that that the Communications Act of 1934, as amended (Act), does not preempt the Bankruptcy Code, and that carrier-suppliers have the same rights as all other service providers to a "cure" of outstanding indebtedness on existing service arrangements that are assumed (and assigned) during the course of the bankruptcy. Indeed, while some carriers have tried to game the interplay between telecommunications law and bankruptcy law to avoid this obligation, the simple fact is that the right to a cure expressly exists both under the bankruptcy code itself and under carriers' individual tariffs.

Further, throughout the bankruptcy process, the FCC should encourage timely notice to interconnecting carrier customers. To ensure a smooth transition, the FCC should clarify when a carrier is required to provide notice to its customers of possible impairments of service. Moreover, when a carrier intends to sell or auction its assets, it is typically not known whether the purchaser will wish to take assignment of the debtor's existing service arrangements. Thus, USTA recommends that when a carrier files under Chapter 11 and initiates an auction of assets, it should have to inform customers of a possible discontinuation of service. Similarly, upon filing a motion for sale or acceptance of a purchase agreement, a carrier should be required to inform its customers that it will cease or transfer operations when the sale is complete. The same should be true when a bankruptcy is converted from one under Chapter 11 to one under Chapter 7.

In addition to implementing the foregoing five recommendations specific to bankruptcy proceedings, USTA believes that it is imperative for the FCC to resist suggestions, in anticipation of a possible WorldCom bankruptcy filing, that it set aside proceedings that are equally important to the continued health and stability of the telecommunications industry, including the UNE Triennial Review, its Broadband dockets, and pending and future section 271 applications. The FCC must bring such proceedings to a close as quickly as possible. They are of utmost importance in stimulating future investments in the telecommunications industry, job creation, consumer welfare, and our nation's technology leadership.

While a WorldCom bankruptcy would be of a magnitude not before experienced by the telecom industry, USTA believes that the FCC's paramount responsibility is to lessen the magnitude of the aftershocks on consumers and the entire United States telecom industry. Thus, USTA would appreciate a meeting with you to further discuss our recommendations at your earliest convenience.

Sincerely,



Walter B. McCormick, Jr.

CC: Commissioners Copps, Abernathy, Martin